

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LSM Radio Partners, L.L.C.

Licensee of Station WWWW(FM)

Islamorada, Florida

Facility ID # 34355

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)
) File No: EB-08-MA-0188
)
) NAL/Acct. No.: 200932600001
)
) FRN: 0010245207
)

FORFEITURE ORDER

Adopted: August 2, 2010

Released: August 4, 2010

By the Regional Director, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of eight thousand five hundred dollars (\$8,500) to LSM Radio Partners, L.L.C. (“LSM Radio”), licensee of station WWWW(FM), in Islamorada, FL for willful and repeated violation of Sections 11.35(a) and 73.1125(a) of the Commission’s Rules (“Rules”).¹ The noted violations involve LSM Radio’s failure to maintain: (1) operational Emergency Alert System (“EAS”) equipment when station WWWW(FM) was in operation; and (2) a full-time managerial and staff presence at the station’s main studio consistent with the Rules.

II. BACKGROUND

2. On February 6, 2009, in response to a complaint alleging that radio station WWWW(FM) did not have EAS equipment installed at its main studio, the Enforcement Bureau’s Miami Office (“Miami Office”) issued a Letter of Inquiry (“*LOI*”) to LSM Radio requesting information regarding its EAS equipment. In a response dated March 4, 2009, LSM Radio stated that the station did not have operational EAS equipment installed in its main studio between May 15, 2007 and February 13, 2009.² LSM Radio also stated that it repaired the station’s EAS unit on February 13, 2009.³

3. On April 9, 2009, after an agent from the Miami Office had difficulty locating the main studio for station WWWW(FM), the agent conducted a telephone interview with the general manager (“GM”) for LSM Radio. The GM stated that station WWWW(FM) had terminated its local marketing agreement (“LMA”) with Caribbean Broadcasting, Inc. and moved out of its previous main studio location in Homestead, FL. The GM stated that station WWWW(FM) would generate all programming from its transmitter site in Rock Harbor, FL.⁴ The GM stated that the transmitter site would serve as the main studio until LSM Radio entered into a new LMA and found a new studio location.

¹ 47 C.F.R. §§ 11.35(a) and § 73.1125(a).

² See *LOI* Response at 4.

³ *Id.* at 5.

⁴ LSM Radio also stated that it would generate original programming for WWWW(FM) from its transmitter site as of February 9, 2009. *LOI* Response at 4.

4. On July 7, 2009, agents from the Miami Office attempted to inspect the main studio for station WWWK(FM) in Rock Harbor, FL during normal business hours. The agents observed a locked fence surrounding the perimeter of the studio building. No station staff was present at the time of inspection and no telephone number was posted on the studio building. The agents called the station's contract engineer, who later met them on site, to conduct an inspection of the station's EAS equipment. The EAS equipment was operational. However, the contract engineer would not answer any questions regarding the regular staffing of the main studio.

5. On August 3, 2009, an agent from the Miami Office again attempted to inspect the main studio for station WWWK(FM) in Rock Harbor, FL during normal business hours. The agent observed a locked fence surrounding the perimeter of the studio building. No station staff was present at the time of inspection and no telephone number was posted for the station.

6. On September 8, 2009, the Miami Office issued a *Notice of Apparent Liability for Forfeiture* to LSM Radio in the amount of fifteen thousand dollars (\$15,000), for the apparent willful and repeated violation of Sections 11.35(a) and 73.1125(a) of the Rules.⁵ LSM Radio submitted a response to the *NAL* requesting reduction or cancellation of the proposed forfeiture based on its history of compliance with the Rules, its prompt action to repair its EAS equipment, and its inability to pay the forfeiture. LSM Radio's response does not dispute the violations identified in the *NAL*.

III. DISCUSSION

7. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),⁶ Section 1.80 of the Rules,⁷ and the Commission's *Forfeiture Policy Statement*.⁸ In examining LSM Radio's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁹ As discussed below, we have considered LSM Radio's response in light of these statutory factors and reduce the proposed forfeiture to \$8,500, based on LSM Radio's documented inability to pay.

8. Every broadcast station is part of the nationwide EAS network and is categorized as a participating national EAS source unless the station affirmatively requests authority to refrain from participation, and that request is approved by the Commission.¹⁰ The EAS enables the President and state and local governments to provide immediate and emergency communications and information to the general public.¹¹ State and local area plans identify local primary sources responsible for coordinating carriage of common emergency messages from sources such as the National Weather Service or local

⁵ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200932600001 (Enf. Bur., Miami Office, September 8, 2009) ("*NAL*").

⁶ 47 U.S.C. § 503(b).

⁷ 47 C.F.R. § 1.80.

⁸ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) ("*Forfeiture Policy Statement*"), *recon. denied*, 15 FCC Rcd 303 (1999).

⁹ 47 U.S.C. § 503(b)(2)(E).

¹⁰ 47 C.F.R. §§ 11.11, 11.41.

¹¹ 47 C.F.R. §§ 11.1, 11.21.

emergency management officials.¹² Required monthly and weekly tests originate from EAS Local or State Primary sources and must be retransmitted by the participating station. As the nation's emergency warning system, the Emergency Alert System is critical to public safety, and we recognize the vital role that broadcasters play in ensuring its success. The Commission takes seriously any violations of the Rules implementing the EAS and expects full compliance from its licensees.

9. Section 11.35(a) of the Rules requires all broadcast stations to ensure that EAS encoders, EAS decoders, and attention signal generating and receiving equipment are installed and operational so that the EAS monitoring and transmitting functions are available during the times a station is in operation. LSM Radio admits that station WWWK(FM) did not have operational EAS equipment between May 15, 2007 and February 13, 2009, and that the station was in operation during this period. LSM Radio, nevertheless, requests cancellation or reduction of the proposed forfeiture, because it fixed its EAS equipment by February 13, 2009, one week after the Commission issued the *LOI*. However, the Commission has long held that post-notification corrective action taken to come into compliance with the Rules is expected, and such corrective action does not nullify or mitigate any prior forfeitures or violations.¹³ Thus, based on the evidence before us, we find that LSM Radio willfully¹⁴ and repeatedly¹⁵ violated Section 11.35(a) of the Rules by failing to ensure that EAS equipment was operational when the station was in operation between May 15, 2007 and February 13, 2009.

10. Section 73.1125(a) of the Rules requires broadcast stations to maintain a main studio.¹⁶ “A station must equip the main studio with production and transmission facilities that meet applicable standards, maintain continuous program transmission capability, and maintain a meaningful management and staff presence.”¹⁷ The Commission has defined a minimally acceptable “meaningful presence” as full-time managerial and full-time staff personnel.¹⁸ On July 7, 2009 and August 3, 2009, no management or staff employees of station WWWK(FM) were present at the main studio in Rock Harbor, FL during normal business hours. The perimeter fence was locked on both days. LSM does not dispute that its main studio was unstaffed. LSM Radio instead requests a reduction in the amount of the proposed forfeiture, because it states that, due to its financial situation, it was faced with either going silent or

¹² 47 C.F.R. § 11.18. State EAS plans contain guidelines that must be followed by broadcast and cable personnel, emergency officials and National Weather Service personnel to activate the EAS for state and local emergency alerts. The state plans include the EAS header codes and messages to be transmitted by the primary state, local and relay EAS sources.

¹³ See *Seawest Yacht Brokers*, Forfeiture Order, 9 FCC Rcd 6099 (1994), *Rama Communications, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 4981 (Enf. Bur. 2009), *Bethune-Cookman College, Inc.*, Forfeiture Order, 24 FCC Rcd 4513 (South Central Region 2009), *International Broadcasting Corporation*, Order on Review, 25 FCC Rcd 1538 (2010).

¹⁴ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful’, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act....” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991) *recon. denied*, 7 FCC Rcd 3454 (1992).

¹⁵ As provided by 47 U.S.C. § 312(f)(2), a continuous violation is “repeated” if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Company*, 6 FCC Rcd 4387, 4388 (1991) and *Western Wireless Corporation*, 18 FCC Rcd 10319 at fn. 56 (2003).

¹⁶ 47 C.F.R. § 73.1125(a).

¹⁷ *Main Studio and Program Origination Rules*, Memorandum Opinion and Order, 3 FCC Rcd 5024, 5026 (1988).

¹⁸ *Jones Eastern of the Outer Banks, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 3615, 3616 (1991), *clarified* 7 FCC Rcd 6800 (1992).

operating an unstaffed main studio. Licensees are, however, expected to comply with all of the rules, regardless of individual circumstances, and may apply for waivers of the rules in the event compliance is not possible.¹⁹ LSM Radio makes no claim that it applied for or received a waiver in this instance. Thus, based on the evidence before us, we find that LSM Radio willfully and repeatedly violated Section 73.1125(a) of the Rules by failing to maintain a full-time managerial and staff presence at the station's main studio on July 7, 2009 and August 3, 2009.

11. LSM Radio asserts that its record of compliance with the Commission's rules warrants mitigation of the forfeiture. The Commission may take into account the duration of a violation, however, in considering whether a licensee has a history of overall compliance.²⁰ Here, LSM Radio operated without operational EAS equipment for approximately 21 months.²¹ Given the duration and seriousness of the violation, we do not believe that LSM Radio has demonstrated a history of overall compliance with the Commission's rules and therefore find that no reduction of the forfeiture based on this factor is warranted.

12. Finally, LSM Radio asserts that the forfeiture would pose a financial hardship and requests reduction or cancellation of the forfeiture on this basis. With regard to an individual's or entity's inability to pay, the Commission has determined that, in general, gross revenues are the best indicator of an ability to pay a forfeiture.²² We have reviewed LSM Radio's submitted documentation and conclude that the forfeiture should be reduced to \$8,500, based on its documented inability to pay the forfeiture amount proposed in the *NAL*.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, LSM Radio Partners, L.L.C. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand five hundred dollars (\$8,500) for violations of Section 11.35(a) and 73.1125(a) of the Rules.²³

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²⁴ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to

¹⁹ See *Claro Communications LTD*, Forfeiture Order, 23 FCC Rcd 359 (South Central Region 2008).

²⁰ See *Commercial Radio Service Corp.*, Forfeiture Order, 16 FCC Rcd 3543, 3545 (Enf. Bur. Tech. & Pub. Safety Div., 2001) (denying a reduction for a history of overall compliance where the licensee operated eleven specialized mobile radio stations without authorization for five months).

²¹ See *TV 45 Productions, Inc.*, Forfeiture Order, 17 FCC Rcd 11259 (Enf. Bur. 2002) (denying a reduction for a history of overall compliance where the licensee operated without operational EAS for one year).

²² See *PJB Communications of Virginia, Inc.*, Forfeiture Order, 7 FCC Rcd 2088, 2089 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 16 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

²³ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 11.35(a), 73.1125(a).

²⁴ 47 U.S.C. § 504(a).

U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. LSM Radio shall also send electronic notification on the date said payment is made to SCR-Response@fcc.gov.

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to LSM Radio at its address of record and to its counsel, David G. O’Neil, Esq., Rini Coran PC, 1140 19th Street NW, Suite 600, Washington, DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton
Regional Director, South Central Region
Enforcement Bureau